

EXHIBIT D

THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
W.R. GRACE & CO., et al.)	Case No. 01-01139 (JJF)
)	(Jointly Administered)
Debtors.)	

**UNITED STATES' RESPONSE TO DEBTORS' MOTION FOR ENTRY OF CASE
MANAGEMENT ORDER, MOTION TO ESTABLISH BAR DATE, MOTION TO
APPROVE CLAIM FORMS, AND MOTION TO APPROVE NOTICE PROGRAM
(DOCKET NUMBER 536)**

The United States takes no position on the case management order, bar date, claim forms, and notice program Debtors have proposed. However, Debtors incorrectly characterize the results of ongoing Environmental Protection Agency ("EPA") investigations into asbestos-contamination in Libby, Montana in the background information provided in Debtors' Memorandum in Support of Motion for Entry of Case Management Order, Motion to Establish Bar Date, Motion to Approve Claim Forms, and Motion to Approve Notice Program ("Debtors' Mem."). While not directly relevant to the relief sought in the procedural motions currently before the Court, the United States believes it is important to set the record straight.

Debtors contend that "[s]cientific testing of the air in homes with [zonolite attic insulation ("ZAI")] has found either no asbestos fibers or almost non detectable levels." (Debtors' Mem. at 4.) Purported support for this contention includes the statement that in EPA testing of homes in Libby, Montana containing ZAI, "the highest asbestos air concentration was .00003 f/cc." (Debtors' Mem. at 4.) This is incorrect and misleading on several levels. As an

initial matter, Debtors misstate the findings of EPA's early "passive" air sampling in certain Libby homes, the apparent basis of Debtors' contention. In fact, EPA's early testing found asbestos fibers in amounts 10 to 100 times higher than the level Debtors acknowledge in their Memorandum. Debtors' misstatement of EPA's results is perplexing in that W.R. Grace & Co.'s ("Grace") own expert on asbestos issues evaluated the samples collected in EPA's passive sampling and found the fiber level to be up to 300 times higher than that acknowledged in Debtors' Memorandum. See Analysis of December 1999 Indoor Air Samples from the Export and Screening Plants, RJ Lee Group, Inc. (September 27, 2001) at 5. Moreover, the passive testing was intended to measure the presence of asbestos in houses in quiet conditions, and was not intended to assess ambient fiber levels during typical household activities (i.e., sweeping, vacuuming, home repairs, etc.). As Grace is aware, EPA has conducted "active" sampling at homes in Libby that indicates exposure levels at 10,000 to 100,000 times higher than the exposure level Debtors reference in their Memorandum.

In this same bullet, Debtors state that the exposure level EPA has found in Libby homes "is 3,000 times lower than the permissible occupational exposure level of 0.1 f/cc, eight hours a day, 50 weeks per year for 45 years set by the Occupational Safety and Health Administration ("OSHA")." (Debtors' Mem. at 4-5.) Debtors' misstatement of the findings of EPA's passive sampling, discussed above, obviously infects this conclusion. Less obviously, Debtors imply that an OSHA standard that governs workplace exposure applies to household exposure – or is at least relevant to household exposure. This implication ignores the numerous differences between the two settings. OSHA's regulatory framework assumes an informed adult population whose exposure is limited to the work day. In addition, it assumes that covered workers are fully aware

of the hazards of the occupational environment, trained to avoid unnecessary exposure, actively participate in medical monitoring and use specialized equipment (e.g., respirators and/or protective clothing) when necessary to protect their health. None of these assumptions hold true for the typical household. Moreover, the increased health risk OSHA has identified with the 0.1 f/cc permissible exposure level is significant – a lifetime risk of 3.4 deaths per 1,000 workers and a 20 year exposure risk of 2.3 deaths per 1,000 workers, see 59 Fed. Reg. 40,964, 40,978-82 (August 10, 1994). Obviously, health risks that are deemed acceptable in the asbestos-impacted workplace (which assume the protections discussed above) may be unacceptably high when they occur in the home or in workplaces that are not asbestos-impacted. Accordingly, Grace simply cannot assume that the OSHA permissible occupational exposure level can be extended to other exposure contexts.

Later in the Debtors' Memorandum, Debtors state that of the 35 locations sampled by EPA in 1999 and 2000, "only a few had detectable asbestos fibers in soil, dust, or air of the type found at the Libby mine" in support of their contention that asbestos contamination in Libby may not be widespread. (Debtors' Mem. at 50.) Debtors also quote statements from EPA's on-scene coordinator in early 2000 that "[n]one of the results from the soil, insulation and dust samples point to obvious candidates for cleanup." (Debtors' Mem. at 52.) Debtors' assessment of the scope of the Libby contamination based only on the limited testing performed by early 2000 rather than the whole body of data available is inexplicable. Quite simply, Debtors' assessment has been overtaken by events. Debtors make broad assertions based on early data often measuring narrow exposure circumstances. EPA has now tested over 100 houses in Libby, and many other industrial areas. Two areas of significant contamination have been identified and

cleaned up, seven other cleanups are taking place this summer and EPA anticipates that ongoing analysis of other locations in and near Libby will lead to additional cleanup actions. Debtors simply cannot pretend that there may not be a significant asbestos contamination problem in Libby.

Finally, Grace contends that ZAI "may contain trace quantities of asbestos as a mineralogical impurity – minute fractions of 1%. For that reason, ZAI does not meet the regulatory definition of an asbestos-containing product." (Debtors' Mem. at 1.) In support of this contention, Debtors cite the definition section of the National Emission Standard for Asbestos, 40 C.F.R. § 61.141, and the Asbestos in Schools regulations, 40 C.F.R. § 763.83. The National Emissions Standard for Asbestos regulates manufacturing activities, certain installation, demolition and renovation activities, operations in which asbestos-containing materials are sprayed or fabricated, and the disposal of asbestos-containing materials. The regulations expressly do not apply to asbestos-containing materials in residential structures of four or fewer

units. The Asbestos in Schools regulations apply, of course, only to schools. Thus, the regulations Debtors cite do not purport to address the presence of ZAI in single family homes. More significantly, the regulations Debtors cite are not determinative of whether the presence of asbestos in attic insulation or elsewhere poses a hazard to human health or the environment. EPA has already determined that asbestos levels at nine locations in Libby are substantial enough to warrant cleanup pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* Review of additional locations is ongoing.

In conclusion, the United States believes that the Debtors' characterization of EPA's investigation and cleanup activities in Libby in their Memorandum is inaccurate and requires the foregoing clarification.

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**CERTIFICATE OF COUNSEL
APPEARING ON BEHALF OF GOVERNMENT AGENCY**

I undersigned counsel submits this certification pursuant to Del. Bankr. L.R. 9010-1(c)(ii) and certifies as follows:

1. I am employed by the United States Department of Justice.
2. I am a member in good standing of the Bar of the District of Columbia, as well as an inactive member of the State Bar of North Carolina.
3. I am admitted to practice before the U.S. District Court for the District of Colorado, the District of Columbia Court of Appeals and the Supreme Court of North Carolina.
4. I am in good standing in all jurisdictions in which I have been admitted.
5. I agree to be bound by the rules of this Court and submit to the jurisdiction of this Court for disciplinary purposes.


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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2001, I caused a copy of the United States' Response to Debtors' Motion For Entry of Case Management Order, Motion to Establish Bar Date, Motion to Approve Claim Forms, And Motion to Approve Notice Program (Docket Number 536) and the Certificate of Counsel Appearing on Behalf of Government Agency to be served via U.S. mail, postage prepaid, upon the parties-in-interest on the attached service list and via facsimile to the following:

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